**o:** ag1 <ag1@anao.gov.au>  
**Subject:** Re: carpark audit [SEC=OFFICIAL]

Siobhan

Thank you for the reply.

I understand from it ANAO has not, to date, reviewed legal advice to Parliament or agencies.

In my view it should seriously consider doing so at least where, on face value, decisions appear unsupportable at law.

In the case of carparks, at face value it appears funding decisions were not lawful.  That also is the reported view of eminent Constitutional lawyer Professor Cheryl Saunders AO.

My understanding is Commonwealth Government grants must

1. be supported by legislation or;
2. be made to the States.

Regarding (a) the range of subjects on which the Commonwealth is able to legislate is set by the Constitution.  Carparks do not appear to be one of the matters about which the Commonwealth is able to legislate.  If so,neither *the Land Transport Act (2014)*nor *the Public Governance, Performance and Accountability Act (2013*) can authorise spending on carparks, irrespective of their provisions.  Nor can any other legislation.

Regarding (b), the text of the Constitution, s.96, has Parliament – rather than Executive Government, a Minister - setting conditions on such spending e.g. that funds be spent on carparks.

ANAO’s report referred to intergovernmental agreements – national partnerships, federation funding etc.  These agreements are between governments, not Parliaments.  They cannot extend Commonwealth legislative power.  They cannot give the Commonwealth Government new powers including to spend monies on subjects not mentioned in the Constitution, like carparks.  They do not override the requirements of s.96.  Nor do they bypass the Constitution’s limited mechanisms for formal cooperation between the Commonwealth and States.  The High Court put it:

*‘Consultation between the Commonwealth and States coupled with silent, even expressed, acquiescence by the States does not supply otherwise absent constitutional power to the Commonwealth. The Constitution contains several provisions by which the States and the Commonwealth may join in achieving common ends. It is enough to mention only s 51(xxxvii) (about referral of powers) and s 96 (about grants on condition).’*[***[1]***](https://outlook.live.com/mail/0/id/AQMkADAwATMwMAItY2E4Zi1lZDI2LTAwAi0wMAoARgAAA9KLwScpm7NMgvvF0q8L87gHAOgVFQDlWkYfT4ask1InnNzYAAACAQkAAADoFRUA5VpGH0%2BGrJNSJ5zc2AAEoZ8dYwAAAA%3D%3D#x_x__ftn1)

This indicates the corridor of potential legality of programs on topics outside the scope of Commonwealth purposes - such as carparks - to be very narrow, with strict conditions imposed on decision making.  Potentially there are many such programs e.g. for local roads, local governments.

For spending topics - within programs - that are incapable of having any legislative foundation, competent Departmental advice should identify conditions that must be observed for Constitutional legality.  In my view ANAO should sight and review that advice.

It may well be such advice says spending on some topics is unlawful, but nonetheless, is ignored by Ministers and Departments.  Equally, it may be such advice is not sought by Ministers or Departments for fear it may interfere with their whims.

This seems to me an important matter for ANAO to assure itself.  Not least, because lack of comment on the issue is almost certain to be represented by the Government and bureaucracy - to the electorate - as official satisfaction as to legality.  That is, it is not good practice for review agencies to not inquire into questions of apparent illegality in reviews they undertake.

Regards

J Austen,

17 August, 2021

[[1]](https://outlook.live.com/mail/0/id/AQMkADAwATMwMAItY2E4Zi1lZDI2LTAwAi0wMAoARgAAA9KLwScpm7NMgvvF0q8L87gHAOgVFQDlWkYfT4ask1InnNzYAAACAQkAAADoFRUA5VpGH0%2BGrJNSJ5zc2AAEoZ8dYwAAAA%3D%3D#x_x__ftnref1) https://eresources.hcourt.gov.au/showCase/2014/HCA/23

**From:** ag1 <ag1@anao.gov.au>  
**Sent:** Friday, 13 August 2021 3:35 PM  
**To:** John Austen <jadebeagle@outlook.com>  
**Cc:** ag1 <ag1@anao.gov.au>  
**Subject:** RE: carpark audit [SEC=OFFICIAL]

**OFFICIAL**

Dear Mr Austen

Thank you for your email.  The purpose of the Australian National Audit Office (ANAO) is to support accountability and transparency in the Australian Government sector through independent reporting to the Parliament, and thereby contribute to improved public sector performance.

This is primarily achieved by conducting financial statement audits of all Australian Government agencies, assurance reviews and performance audits of selected Australian Government agencies. Performance audits, in particular, primarily focus on systemic issues in the administration of government program and often make specific recommendations to assist public sector entities to improve performance.

Chapter 2 of [Auditor-General Report No. 47 2020–21](https://www.anao.gov.au/work/performance-audit/administration-commuter-car-park-projects-within-the-urban-congestion-fund) examined whether the Urban Congestion Fund (UCF) was well designed. Departments are expected to consider constitutional and legislative risks when advising the Australian Government on the design and establishment of new programs, and the ANAO examined whether this occurred with the UCF. As set out in the Audit Report:

* The *National Land Transport Act 2014* (NLT Act) provides ‘for the funding of projects related to land transport matters, and for related purposes’.
* The UCF was established as a sub-program of the Infrastructure Investment Program and UCF projects are funded as ‘Investment Projects’ under Part 3 of the NLT Act.
* Projects funded under the NLT Act are governed by the National Partnership Agreement on Land Transport Infrastructure Projects (‘National Partnership Agreement’). This Agreement was most recently updated and agreed by the Australian, state and territory governments in July 2019.
* The Schedules to the National Partnership Agreement indicate the levels of funding the Australian Government intends to provide to the states/territories for land transport infrastructure projects, including for each UCF project. Inclusion in the Schedules is not a guarantee of funding. Funding must be subsequently approved by the Minister in accordance with the relevant legislation, notably with the NLT Act and the *Public Governance, Performance and Accountability Act 2013* (PGPA Act).
* The National Partnership Agreement is a schedule to the Federation Funding Agreement — Infrastructure, which was created subject to the provisions of the Intergovernmental Agreement on Federal Financial Relations.  National Partnership payments, including the UCF payments, are made to the states for the purposes of the *Federal Financial Relations Act 2009*.

While the ANAO may examine the identification and assessment of risks during the design phase of new programs that are being audited, the ANAO does not review or provide legal decisions or advice to the Parliament or Government agencies.

Kind regards

Siobhan

External Relations

Professional Services and Relationships Branch

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